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PATRICK K. McGOWAN
COMMISSIONER

MEMORANDUM

February 6, 2006

To: Commission Members

From: Jeremy Pare, Senior Planner

Re: **CLUP Revision – Conservation Easements**
February 13, 2006 Commission Meeting

The Commission Meeting on February 13th in Augusta provides the Commission and staff an opportunity to hear from a panel of individuals on LURC's potential role with the conservation easement. We have invited Steve Sader (Professor of Forest Resources at University of Maine at Orono), Alan Hutchinson (Forest Society of Maine), Bill Patterson and Tom Rumpf (Nature Conservancy), Tim Glidden (State Planning Office), Ralph Knoll (Bureau of Parks and Lands), Steve Schley (Pingree Associates), Paul Mattor (The Mattor Company), and Jeff Pidot (Attorney General's Office) to share their knowledge.

The panelists have been asked to speak to their individual roles with the conservation easement. In so doing, each individual has also been asked to address Jeff Pidot's comments and recommendations from our December meeting, and place these comments in the context of deemed feasibility. I suggest looking closely at the attached document for a summary of Mr. Pidot's recommendations.

If you have any questions or comments regarding this memorandum or its contents, please feel free to call me at 287-4194. I look forward to seeing you all again on February 13th.

Jeff Pidot Recommendations

- More involvement from the public regarding the location and design of easements.
- Increased easement holder requirements including financial capacity, validation of track record, and monitoring reports.
- Increased requirements for baseline monitoring.
- Increased consideration of backup holders.
- Easement registration for LURC's jurisdiction.
- Increased participation in state held easements.

“A Conversation about Conservation Easements”

Presentation to the Land Use Regulation Commission

Jeff Pidot

December 7, 2005

Thanks for the kind introduction. It feels a little foolish to be formally introduced to one's own family, which is what LURC is to me, but it is always a good feeling to be here with you.

You asked me to address you today *not* in my capacity as your lawyer or a representative of the Attorney General's Office, but to relate to you some of my personal thoughts as a student of conservation easements, a subject that as you know I've been studying for some time both in my professional work, my volunteer work with land trusts and intensively during my time away during a year while at the Lincoln Institute of Land Policy. You have a copy of the report on this subject that I authored while at the Institute.

I'm calling this presentation “a conversation,” because it's not intended to be a lecture. I'll talk for a spell, but then the important part of this discussion will be your participation, not just in Q&A (which would assume that you've got questions and I've got answers) but in a discourse about a subject that has become bigger than life around the country, and particularly in Maine which some consider to be the promised land of conservation easements.

I make note that in the audience here today are a number of people who have considerable knowledge about conservation easements, including Alan Hutchinson of the Forest Society of Maine (a major holder of conservation easements in your jurisdiction), Sarah Medina of Seven Islands Land Management Company (which manages the Pingree lands that are under the largest conservation easement in America) and Jym St. Pierre (the founder of the land trust that serves this region and another expert on conservation easements).

To be sure, my personal thinking about conservation easements has changed over the years, largely due to deep reflection about my own handiwork. What years ago seemed to me to be an easy win-win situation with conservation easements has become something that I believe we need to think much more critically about, so that these new inventions of real estate law deliver on the promises that they purport to make to future generations.

Before I continue, let me lay to rest any notion that I'm trying to challenge the use of conservation easements. On the contrary, I'm a big supporter of them, have myself participated in the creation of many in both my professional and volunteer work. Rather than wanting to undermine conservation easements, I want to do what I can to help save them, but this requires a willingness to critically examine them.

Conservation easements are not just a theoretical abstraction for this Commission. Your jurisdiction is salted and peppered with conservation easements, and will be increasingly so in future years. Some see conservation easements as potentially displacing the role of land use regulation. Since conservation easements are increasingly purchased, often for significant, publicly subsidized money, they are predictably more attractive to landowners than land use regulation, that of course is imposed by government without payment of compensation.

Accordingly, it is important to recognize the value of different approaches to land conservation and protection, each occupying its proper role, so that conservation easements and land use regulation supplement rather than compete with each other. It may also be beneficial, in my mind at least, that conservation easements, that purport to permanently affect the future of our landscapes, have some public component, in which someone representing the public interest has a role to play in the location and design of easements. In Massachusetts, for instance, over the nearly 40 years since its conservation easement enabling act was put in place as one of the first in the nation, every conservation easement has been exposed to public review and approval at both state and local government levels, to determine that it is of public benefit. Rather than resulting in a decline in the use of this tool, the Massachusetts system is well respected by the community of land trusts there, which is the second largest of any state in the nation, and has resulted in more conservation easements than in almost any other state.

At the same time, conservation easements all over the nation are increasingly becoming a *regulatory* tool. In LURC's case, for instance, conservation easements are often an important component in major subdivision and other development projects. You are way ahead of most other land use regulatory agencies that use this tool, because you have adopted relatively sophisticated guidelines and forms that lay out your expectations for the conservation easements that you will allow to be part of a regulatory decision. But, even for you, as for other regulatory agencies as well as land trusts and other holders of conservation easements, I pose this question: "Do you know where your conservation easements are? Do you know that they are secure? Do you know that they are performing and will perform according to their promise and your expectations?"

In the current, some might say almost free-wheeling environment in which conservation easements are deployed in many places, I wonder if future generations will wholeheartedly thank us for the legacy that we're leaving to them.

So, now that I've started the juices flowing, let's back up, define terms and do the numbers.

First, what is a conservation easement? A new invention of real estate law enabled by statute in each of the 50 states, a conservation easement is a set of permanently enforceable rights held by a land trust or government agency, by which a landowner retains ownership of the land but promises, for itself and all future owners, to use the property only in ways permitted by the terms of the easement.

Simple as that? Well, no. Conservation easements are nearly infinitely variable, a fact that I think may haunt us in the future. Depending on its terms and its parties carrying out their duties in the future, a conservation easement can provide for true protection of a landscape or do essentially nothing at all. Virtually all conservation easements are publicly subsidized, either by being purchased with public money, underwritten with tax incentives, or as the quid pro quo for a development project that otherwise might be seen as harming the public's environment. Virtually no conservation easement is what many claim: a purely private arrangement between the landowner and a land trust.

The numbers as well as the complexity of conservation easements have grown exponentially in the last 25 years. This explosion has resulted in what today are likely to be tens and perhaps hundreds of thousands of different conservation easements around the country, but no one knows the exact or even approximate numbers or their locations since very few states have so much as a registry of conservation easements or their holders.

Virtually nowhere are there meaningful legal standards for either the content of conservation easements, the capacity or track record of their holders, or future monitoring and enforcement of easements.

Likewise, in few places are there legal standards that tell us what happens to a conservation easement when its holder goes out of business. It's as if we think this isn't going to happen. Of course, it's going to happen; I'm sure it's already happened, but in most places we don't have any way to know about it or the orphaned easements that result from it. Indeed, recently in the San Diego area a land trust has declared bankruptcy, raising substantial questions about whether its conservation lands and easements will survive.

In sum, the unfettered growth of conservation easements and land trusts around the nation, in some minds, is looking a lot like the dot com phenomenon in the 1990s.

You may find this interesting or even join me in being alarmed about it. But why is this relevant to your work?

First, your jurisdiction has more land in conservation easements than any comparably sized area in the nation, and there likely will be even more every year in the foreseeable future. Indeed, the largest conservation easement ever covers a large array of scattered townships in LURC jurisdiction. All of these conservation easements have a major impact on future land use in your jurisdiction, and that is, indeed, your concern as the land use planning body for this area.

Second, increasingly this Commission is using conservation easements as a tool among its regulatory controls. More often than not, significant subdivision and other development projects include a conservation easement component. It is very important, then, that you know what you are getting in this quid pro quo, and its significance for future land use.

It's also important to recognize that conservation easements, even when derived from a regulatory process like yours, stand alone. They cannot be easily amended or altered, even by you. They are intended to be permanent. They are held by others, whom you entrust to monitor and enforce them.

Around the nation, untold thousands of conservation easements have been born of zoning and other land use regulation decisions at all levels of government, but often the regulatory agency may forget where they are or what they say or even that they exist.

You are blessed to have in place guidelines that attempt to provide some structure for the content of conservation easements and the credentials of their holders, for easements that you bless as part of your regulatory decisions. In this, you are far ahead of most land use regulation agencies that use conservation easements.

Even so, a question that you will want to ask yourselves is whether your guidelines are enough, but while you might ask me this question and I have some ideas, the question is for you as policy-makers to answer. In this, the Q&A that usually attends discussions like this will be something of a role reversal, with me here asking you the questions and your having to grapple with the answers. My job is to help you, not to impose my ideas on you.

So, let's look at your current guidelines and consider their accomplishments, which in the world of conservation easements are not inconsiderable.

1. Your guidelines contain a standardized conservation easement form, which is very useful and departures from which should be justified.
2. Your guidelines contain a number of expectations as to the easement holder, which must either be a government agency or a land trust whose primary mission is land conservation, which has a level of accountability and resources that meet your approval. You have the discretion to require a backup holder where the primary holder doesn't satisfy these tests.
3. You require that you approve any change of easement holders and you reserve the right to say no to any holder or easement that doesn't satisfy you for any reason.

These are all good things.

But now let's consider whether your guidelines might be further strengthened. By these ideas, I don't mean to try to persuade you and certainly am not offering them as legal advice, but here are some thoughts that you might consider.

1. Is it enough in your guideline #2 to suggest that public agencies *always* have the wherewithal to properly monitor and enforce the conservation easements that they hold? Studies of easement holder performance around the country have shown that often

public agencies are the worst offenders in failing to carry out their responsibilities. That's *not* to say that agencies in Maine have less capability than private land trusts, but only to suggest that the inquiry about holder capacity might not stop with determining that a public agency is proposed as holder. That inquiry might also include whether the agency has a track record, does the necessary monitoring, has the necessary and segregated financial resources, and is resolved to enforce if necessary. By the way, that fairly includes inquiry about my agency.

2. Likewise, with conservation easements that LURC is accepting as part of a regulatory approval, should the Commission have direct enforcement authority? Should it at least be periodically monitoring the performance of the easement holder by actively requiring holder reporting – and following up if reporting is not forthcoming?

3. Your guidelines also might be strengthened by requiring adequate baseline documentation before a conservation easement is put in place. Baseline documentation comprises a narrative and photographic snapshot of the condition of the property at the time the easement is established, and it is essential to future enforcement of the easements' terms.

4. In determining the financial capacity of conservation easement holders under your guideline #6, should the Commission require something more than *some* money in a stewardship account? Enforcing just one conservation easement can cost well into six figures. Holders that lack this kind of discretionary money, which frankly is the vast majority of even the most well-intentioned easement holders, ought to have some backup plan, some network, something that gives confidence that they will do their job over the long term. Here, I'm less worried about the outcome of court enforcement decisions than I am about the holder just shying away from expensive litigation and making whatever compromises it takes. I know something about this.

5. In this regard, turning to your guideline #7, perhaps you should consider whether a conservation easement holder should nearly always be required to have a backup holder, just in case. Remember, conservation easements are forever, whatever that means in our law and culture. As lands pass from one owner to the next (with only the first generation receiving the regulatory, tax or other benefits of donating the easement), and as these lands increase in development value, there will be increasing pressure to modify, challenge or even violate conservation easements. There may be a few holders that are strong and wealthy enough to stand up to these challenges, but even The Nature Conservancy has acknowledged vulnerability in this area.

6. The Commission might consider creating a registry of conservation easements, including a map of each, for its entire jurisdiction, which as you know is half of the state's area and far more than half of the lands subject to conservation easements in Maine. This could include not just conservation easements that are part of this Commission's permitting decisions but all conservation easements within your jurisdiction.

Personally, I'd like to see the Legislature require such a registry for the entire state, but until that happens, you might consider taking steps in this direction. Remember: increasingly conservation easements are taking on a role that in the past we might have considered a public process of land use regulation and planning. Since you're in charge of these duties in your jurisdiction, it might be useful for you to know what's going on.

7. In this regard, you might also consider taking steps to participate in the process of conservation easement creation, starting with easements that are acquired by the state but extending even into those that aren't. You can't commandeer in this area, but you can steer. Conservation easements determine the permanent future uses of the landscape in your jurisdiction. You might want to be a part of that process.

8. Finally, there is already concern about conservation easements that the Commission has approved as part of your permitting processes in the past. Is there a way to try to track down these easements and their holders and find out whether they are complying or might be persuaded to comply with some of your current guidelines, not to mention some of the strengthened ones suggested here?

There are other ideas, but that suffices for now. I look forward to working with you constructively in whatever way you direct.

While at the Lincoln Institute for what I call my 'year abroad,' I had the luxury to point to places where I thought that the emperor might have no clothes. For the rest of my days, I want to do what I can to at least get his pants back on.

Thanks for listening. I have no wisdom, only questions. Your wisdom is what is needed.